

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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on 6/15/98
MARIA CANDELARIA

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NUTRONICS IMAGING, INC.,

Plaintiff,

CV 96-2950 (RJD)

-against-

MEMORANDUM &
ORDER

ABRAHAM DANAN, AHARON BEN-HAIM,
SERVICING IMAGING SYSTEMS
INTERNATIONAL, INC., and SIMEX
MEDICAL IMAGING, INC.,

Defendants.

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ABRAHAM DANAN,

Counterclaim - Plaintiff,

-against-

NUTRONICS IMAGING, INC.
AND SCHLOMO AARON,

Counterclaim - Defendants.

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DEARIE, District Judge.

Plaintiff Nutronics Imaging Inc. ("Nutronics") moves to
dismiss the counterclaims of defendants Abraham Danan and Simex
Medical Imaging Systems Inc. ("Simex"). Defendants move to
dismiss the complaint.

On May 14, 1996, Nutronics filed a complaint against its

former employee, Abraham Danan, and Danan's company, Simex, in New York State Court, alleging that Danan : 1) breached his fiduciary duty to Nutronics by soliciting customers of Nutronics on behalf of Simex and misappropriating confidential customer information; 2) tortiously interfered with Nutronics' contracts; and 3) intentionally interfered with Nutronics' business relations. Nutronics also seeks an accounting from Simex and Danan.

On June 12, 1996, the defendants filed their answer and asserted counterclaims alleging that Danan had been promised an interest in Nutronics. The defendants seek : 1) dissolution of the partnership between Danan and Nutronics' principal, Aaron Schlomo, and an accounting; and 2) an order directing delivery of 50% of the shares in Nutronics to Danan, followed by an order dissolving Nutronics and ordering a sale of its assets.

A. The Complaint

Nutronics is a New York corporation engaged in the business of repairing and maintaining medical equipment. The complaint alleges that in April of 1989, Danan went to work for Nutronics as a technician and mechanic. Among the customers Danan serviced was the Medical Center for the Department of Veteran Affairs in the Bronx (the "VA") with whom Nutronics had a service contract.

This service contract ended in May of 1994.

The complaint alleges that Danan formed Simex in November of 1993, "in order to appropriate the customers, potential customers, information and opportunities of Nutronics." Compl.

¶16. The complaint further alleges that "[d]uring the course of his employment . . . with Nutronics and afterwards [Danan] submitted false statements to the Department of Veteran Affairs . . ." in order to discourage the VA from continuing its service and maintenance contract with Nutronics and encourage it to contract with Simex. Compl. ¶¶ 18,19. As a direct result, the VA did not renew its contract with Nutronics. Compl. ¶21. The complaint further alleges that Danan directly solicited other clients of Nutronics. In June of 1994, Danan left Nutronics.

B. The Counterclaim

The counterclaims tell a different story. Prior to 1987, Danan and Aaron worked for Elsinct, Ltd., a manufacturer of medical equipment. In 1987, Aaron left Elsinct and formed Nutronics to service Elsinct manufactured equipment. Aaron convinced Danan, who possessed "greater expertise with Elsinct equipment" to come to Nutronics. Danan claims that he resigned from Elsinct in 1989, to "become associated as a principal together with Schlomo Aaron . . . either as equal partners or

through equal ownership and control of . . . Nutronics and equal sharing of the profits and income generated by it." Countercl.

¶18. Danan claims that he and Aaron shared expenses and rendered services as partners or co-owners of Nutronics.

Danan claims that he left Nutronics in April of 1994, because Aaron failed to sign a Shareholder Agreement that reflected their original understanding, and failed to transfer 50% of Nutronics' stock to Danan. Countercl. ¶20. Following Danan's departure, Aaron locked him out of Nutronics' office.

C. Discussion

In passing on a motion to dismiss, the allegations of the complaint should be construed favorably to the pleader. Scheuer v. Rhodes, 416 U.S. 232 (1974). The review of such a motion is limited, and "the issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." Villager Pond Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995) (quoting Scheuer, 416 U.S. at 235). On a motion to dismiss under Rule 12(b)(6) the court must accept as true the factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. Jackson Nat'l life Ins. Co. v. Merrill Lynch & Co., 32 F.3d 697, 699-700 (2d Cir. 1994). A court must not dismiss the action unless it

appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir. 1994).

1. Plaintiff's Claims

a. Breach of Fiduciary Duty

The defendants argue that Nutronics' claim for breach of fiduciary duty is deficient as it does not allege that Danan solicited accounts during his employment, "but only that he wrote disparaging letters to the VA hospital after his employment" Defs.' Opp'n at 16. The defendants also claim that any charge of breach of fiduciary duty based on Danan's use of customer lists must fail as the identity of Nutronics' customers was not secret.

Generally, an individual may compete with his former employer as to a matter for which he has been employed. Restatement (Second) of Agency §396 (1957). He is not free, however, to take away business from his former employer if the opportunity was facilitated by acts of preparation and disloyalty during his employment, and by the breach of his obligation to use his best efforts in the interest of his employer. AGA Aktiebolag v. ABA Optical Corp., 441 F. Supp 747, 754 (E.D.N.Y. 1977) (citing State Export Co. v. Mol Shipping and Trading Inc., 155 N.Y.S.3d

188). An employee also has a fiduciary duty not to use or divulge confidential knowledge acquired during his employment. Kaufman v. International Business Machines Corp., 470 N.Y.S.2d 720, 723.

The plaintiff's complaint clearly charges that Danan solicited the VA "[d]uring the course of his employment and afterwards." Comp. ¶¶18,19. Thus plaintiff has stated a cause of action for breach of fiduciary duty grounded in Danan's solicitation of Nutronics' customers. The plaintiff has also sufficiently pleaded a cause of action based in Danan's misappropriation of information about Nutronics' customers. Whether or not Nutronics' customer list is confidential is a question of fact not appropriately addressed at this stage.

b. Accounting

The defendants argue that the plaintiff's claim for an accounting is deficient as the plaintiff has failed to set forth facts showing the existence of a fiduciary relationship between Danan and Nutronics.

The basis for an equitable action for an accounting is the existence of a fiduciary or trust relationship respecting the matter in controversy. 1 NY Jur 2d, Accounts and Accounting §30 (1979). The complaint must set forth facts that show: 1) the

existence of a fiduciary relationship; 2) that the defendant was entrusted with property or money of the plaintiff and, in consequence was bound to reveal his dealings in it and; 3) that there is no adequate remedy at law. Id. at §34.

The defendants argue that the relationship between an employer and an employee is not a fiduciary relationship. In support of this argument, the defendants cite cases in which an employee seeks an accounting from his employer. Reichert v. N. MacFarland Builders, Inc., 445 N.Y.S.2d 264; Local 144, Hotel, Hospital, Nursing Home & Allied Services Union, SEIU, AFL-CIO v. CNH Management Assoc., Inc., 713 F.Supp. 680 (S.D.N.Y 1989). It is clear from these cases that an employer, without more, does not owe a fiduciary duty to its employee.

However, in this case, an employer is seeking an accounting from a former employee. New York law is equally clear that an employee owes his employer a fiduciary duty: "an employee is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duty." Burnett Process, Inc. v. Richlar Industries, Inc., 390 N.Y.S.2d 282, 283; Bordell v. General Electric Co., 556 N.Y.S.2d 234, 235; AGA Aktiebolag, 441 F. Supp at 747.

The plaintiff has alleged the facts necessary to sustain an action for an accounting. Danan was an employee of Nutronics and entrusted with confidential information about Nutronics' clientele. In addition, Nutronics cannot, without an accounting, determine which of their former customers left because of Danan's on-the-job solicitation, and how much in income Danan has realized from those accounts.

c. Tortious Interference with Contract

Defendants argue that Nutronics claim for tortious interference with contract is deficient as Nutronics has failed to allege that any client or customer breached a contract as a result of Danan's importuning. A claim for tortious interference must allege: 1) the existence of a valid contract between the plaintiff and a third party; 2) the defendant's knowledge of the contract; 3) the defendant's intentional procurement of the third party's breach of contract without justification; 4) actual breach of the contract and; 5) damages resulting from the breach. Lama Holding Co. v. Smith Barney, Inc., 668 N.E.2d 1370, 1375 (1996); NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc., 87 N.Y.2d 614, 620 (1996).

The complaint alleges that Nutronics had a contract with the VA hospital that ended when the VA "failed to renew its service

and maintenance agreement after March 1994." Comp. ¶21. The complaint also alleges that other customers of Nutronics "discontinued their contractual relations with plaintiff." Comp. ¶28. The plaintiff has not alleged that any customer breached a contract with the Nutronics. Nutronics' customers' failure to renew contracts, even if caused by Danan's solicitation, does not make out a tortious interference claim. Nutronics' third cause of action for tortious interference must be dismissed.

d. Intentional Interference with Business Relations

The defendants contend that the plaintiff's claim for intentional interference with business relations is insufficient because it fails to allege that Danan's motivation was "purely malicious."

The tort of interference with business relations arises when a defendant, by intentional and wrongful means, causes a third party not to enter into or extend a contractual relationship with the plaintiff. WFB Telecommunications, Inc. v. Nynex Corp., 590 N.Y.S.2d 460, 461. Contrary to the defendants' assertion, the plaintiff is not required to allege that Danan's motivation was purely malicious. The sole motive test does not reflect the current standard as enunciated by the New York Court of Appeals. In Guard Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y.2d

183, the court emphasized that liability for interference with prospective business relations depended on proof of "more culpable conduct on the part of the interferer" but did not require that the defendant's sole motive be malice.

The elements to be considered in determining the liability of an alleged interferer are: 1) whether the interference is intended to advance a competing interest; 2) whether the interference has caused a restraint in trade; and 3) whether the means employed were wrongful. Id. at 448; Airship Industries (UK) Ltd. v. Goodyear Tire & Rubber Co., 643 F. Supp. 754, 761 (S.D.N.Y. 1986). "'Wrongful means' include. . . fraud or misrepresentation" Airship Industries (UK) Ltd., 643 F. Supp. at 761; NBT Bancorp Inc., 87 N.Y.2d at 621.

The plaintiff has alleged that Danan submitted "false statements" to the VA during the course of his employment with Nutronics. False statements may be the grounds for an action for intentional interference with business relations. Rochester Brewing Co., Inc. v. Certo Bottling Works, Inc., 80 N.Y.S.2d 925. The plaintiff has also alleged that "[t]he VA would have continued its contractual relationship with Nutronics had it not been for the actions of defendant [Danan]. . . in wrongfully . . . communicating with the VA." Compl. ¶29.

The defendants' motion to dismiss plaintiff's claims for breach of fiduciary duty, an accounting and interference with business relations is denied. The defendants' motion to dismiss plaintiff's claim for tortious interference with contract is granted.

2. Defendants' Counterclaims

a. Dissolution of the Partnership and an Accounting

The defendants admit that there is not currently a partnership between Danan and Aaron, and thus they have no cause of action for dissolution of the partnership.

The defendants have, however, stated a cause of action for an accounting. "The right to an account of his interest shall accrue to any partner . . . as against the . . . surviving partner[] . . . at the date of dissolution. N.Y. Partnership Law §74 (McKinney 1998). A claim for a judicial accounting must include: 1) facts alleging the existence of a partnership and; 2) allegations that the defendant refused to account to the plaintiff with respect to partnership affairs, profits and losses subsequent to the dissolution. NY Jur 2d Business Relationships §§1710, 1722 (1996).

A partnership can arise from an express or implied contract and may be proved by circumstantial evidence. Hartford Accident &

Indemnity Co. v. Oles, 274 N.Y.S. 349, 353 ("[a] partnership . . . may be proved by testimony as to some conversation, by circumstantial evidence, or by proof of the receipt . . . of a share of the profits of the business.")

Danan claims that he and Aaron were partners, alleging that he joined Nutronics on the understanding that he was to be an equal partner and share equally in Nutronics profits. Countercl.

¶18. In addition, Danan alleges that he and Aaron together bought and sold supplies and parts, and serviced equipment.

Countercl. ¶19. Finally, Danan alleges that Aaron has refused to account for the partnerships profits and losses. Danan has thus stated a cause of action for an accounting.

b. Judicial Dissolution of Nutronics

The plaintiff challenges the defendants' second counterclaim insofar as it seeks judicial dissolution of Nutronics.

Citing Friedman v. Revenue Management of New York, Inc., 38 F.3d 668, 671 (2d Cir. 1994), the plaintiff urges this Court to abstain from exercising jurisdiction over the defendants' claim for corporate dissolution. The Court recognizes that there is a strong judicial policy in this Circuit favoring abstention, but declines at this stage of the proceedings to abstain. If the defendants are able to provide evidence that they are entitled to

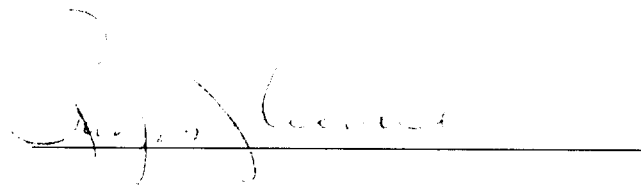
50% of the shares of Nutronics, the Court will revisit the issue of whether dissolution is a remedy within its jurisdiction and equitable powers.

Plaintiff's claim for tortious interference with contract is dismissed. Defendants' claim for dissolution of the partnership between Danan and Aaron is dismissed.

SO ORDERED.

Dated: Brooklyn, New York

June 10, 1998

A handwritten signature in dark ink, appearing to read 'Raymond J. Dearie', is written over a horizontal line.

RAYMOND J. DEARIE

United States District Judge